Supreme Court, U. S.
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In The

Supreme Court of the United States

October Term, 1975

No. 75-1484

PHILIP LUBRANO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TABLE OF CONTENTS

Page

Opinion Below 2

Jurisdiction 2

Questions Presented 2

Statement of the Case 2

Reasons for Granting the Writ 7

Conclusion 20

TABLE OF CITATIONS

Cases Cited:

DeChristoforo v. Donnelly, 473 F.2d 1236 (1st Cir. 1973) . 18

Dutton v. Evans, 400 U.S. 74, 91 S. Ct. 210 16

Favre v. Henderson, 464 F.2d 359 (5th Cir. 1972) 14, 15

Hall v. United States, 419 F.2d 582 (5th Cir. 1969) 20

Henderson v. United States, 218 F.2d 14 (6th Cir. 1955) .. 19

United States v. Manfredonia, 414 F.2d 760 (2 Cir. 1969) ....
..... 11, 12, 14

Contents

	Page
United States v. Ruggiero, 472 F.2d 500 (2d Cir. 1973)	10, 11, 14
United States v. White, 486 F.2d 204 (2d Cir. 1973)	18
Statutes Cited:	
21 U.S.C. Section 841(a)(1)	1
28 U.S.C. Section 1254(1)	2
United States Constitution Cited:	
Sixth Amendment	7
APPENDIX	
A — Judgment of the Court of Appeals	1a
B — Opinion of the Court of Appeals	3a

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To: THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT:

Petitioner Philip Lubrano respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit affirming a judgment of the United States District Court for the Southern District of New York convicting petitioner of conspiracy to distribute and possess cocaine in violation of 21 U.S.C. Section 841(a)(1).

OPINION BELOW

The United States Court of Appeals for the Second Circuit affirmed the judgment of the District Court in a written opinion and is annexed hereto as Appendix B.

JURISDICTION

The judgment of the Court of Appeals was entered on December 30, 1975 and is annexed hereto as Appendix A.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1).

An application for an extension of time to file this petition has not been entertained.

QUESTIONS PRESENTED

1. Whether the government agent's testimony relating his out-of-court instructions to the unavailable confidential informant was prejudicial hearsay that deprived petitioner of a fair trial and confrontation of witnesses.

2. Whether the prosecutor's summation deprived petitioner of a fair trial.

STATEMENT OF THE CASE

Petitioner Philip Lubrano was indicted along with two others, Anthony Rizzo and Victore Vitale, in a three count

indictment returned by a federal grand jury. All three defendants were charged in Count 1 with conspiracy to distribute and possession with intent to distribute cocaine. The second count of the indictment charged the defendant Victor Vitale only with possession and distribution of 102 grams of cocaine. The third count charged Lubrano with possession and distribution of 112.2 grams of cocaine.

The case was tried before the Honorable Constance Baker Motley and a jury during January of 1975. On January 17, 1975, the jury found defendants Lubrano, Rizzo, and Vitale guilty on Count 1 and defendant Vitale guilty on Count 2. Lubrano was acquitted of the substantive crime charged against him in Count 3 (T980-981).*

The government's case against petitioner was purely circumstantial and consisted almost entirely of testimony of special agents from the Drug Enforcement Administration, based on their surveillance of the three defendants and an informant, and tape recordings of conversations of people other than petitioner. Tony Finn, the confidential government informant and a key participant in the events in question, had died prior to the trial and, thus, was unable to testify.

The facts in the case can be summarized by reporting the events that transpired on several crucial days.

On May 1, 1973, defendant Rizzo and informant Tony Finn, carrying $800 provided to him by the law enforcement

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* The notation "T" followed by a number refers to the pages of the trial transcript.

officers, met at Jay's Jewelry Box, a jewelry store located on Canal Street. Shortly thereafter, they exited together and proceeded to Block's Bar where they remained for several hours. Defendant Vitale also entered this same bar; all three men then departed and next went to Jay's Jewelry Box where they remained for several minutes.

Defendant Rizzo left the scene at this point while defendant Vitale and informant Finn went into Finn's automobile and discussed drug deals for about one-half hour. Next, Mr. Vitale left the car and Finn drove away.

At a predetermined spot, Finn turned over to the special agent from the Drug Enforcement Administration a quantity of cocaine.

On May 8, 1973, Finn arrived at Lucky's Bar in the Bronx. About twenty minutes later, defendant Vitale entered the same bar. The two conversed for about 45 minutes until they left the bar and went their separate ways. Petitioner was not connected in any manner with these two above-recited meetings.

On May 10, 1973, undercover informant Finn parked a car rented by the government containing $3,500 in cash in the trunk on Canal and Allan Streets. Finn entered the East Side Jewelry Exchange, which is defendant Vitale's business establishment, and shortly thereafter left the store and was driven away from the scene by governmental agents.

Defendant Vitale was observed leaving his place of business, the East Side Jewelry Exchange, walking to his car, driving

around, parking his vehicle alongside of the rented auto, getting out of his car, removing the package which contained the $3,500 in marked money, getting back into his automobile and driving away in an uptown direction.

On the 11th day of May, 1973, the rented vehicle was again driven back to the same Canal Street neighborhood and parked on the street. Between 5:00 and 6:00 P.M., Mr. Vitale was seen leaving the East Side Jewelry Exchange and driving away in his car. Approximately one hour later at about 7:00 P.M., a young Oriental male approached the rented vehicle, unlocked its rear trunk, placed a package inside, closed the trunk, and proceeded to the East Side Jewelry Exchange. A few minutes after this event, Mr. Vitale again left the East Side Jewelry Exchange, got into his car, and proceeded in an uptown direction. The package deposited in the trunk, it was subsequently discovered, contained 102 grams of cocaine hydrochloride and two $100 bills which were part of the money left in the rented car trunk on the previous day.

On both the 10th and 11th days of May, petitioner was never seen by any of the many government agents assigned to this case, not even at the Kat Vin Jewelry Exchange store where he worked and where Mr. Vitale was viewed on May 11, 1973.

On August 20, 1973, informant Finn was provided with $3,750 in government funds. Finn parked his automobile in the vicinity of 56th Street and Lexington Avenue and entered the nearby Gion Bar. Shortly thereafter, petitioner was seen exiting from his shop, the Kat Vin Jewelry Store, and going in to the Gion Bar, which is about two stores away. In the bar, two people who were talking to Finn at the bar counter, including

defendant Rizzo, joined with Finn in exchanging greetings and conversing with petitioner after he entered the bar.

Minutes later, Finn and petitioner came out of the Gion Bar, walked around the corner, and entered a luncheonette named the Gaiety East Luncheonette. After a passing of approximately five minutes, Finn was observed leaving the luncheonette, allegedly with a bulge in his front left pocket. He climbed into his motor vehicle and drove away from the area.

A short while later, Finn gave a special agent a package which contained 112.2 grams of cocaine hydrochloride. Government agents testified that they had no knowledge of their own as to who transferred this package to Finn and that there was an unknown number of people present in the luncheonette besides Finn and petitioner. It was conceded that, despite close observation, petitioner was never seen providing Finn with any cocaine and that a third party in the luncheonette could have given Finn the package.

On October 4, 1973, Finn parked his car in the neighborhood of 56th Street and Lexington Avenue. Petitioner was seen entering a large apartment building at 141 East 55th Street. Finn, sometime later, went into the same building separately. Finn exited from the residential structure alone approximately 20 to 30 minutes later, went to his auto, and drove away from the area.

Finn was given $6,400 by the law enforcement officials whom he rendezvoused with, returned by car to the same locale, disappeared once again into the 141 East 55th Street apartment

building, remained inside for a time period of about 15 minutes, and finally left the building carrying a cylinder, which he later gave to the government agents. The cylinder contained a quantity of cocaine.

No government witness saw specifically where or from whom Finn acquired this cylinder. Nor was petitioner ever observed selling narcotics to anyone at anytime, although there were several extensive surveillances of him. Finally, the government agents admitted that they did not entirely trust their informant, Mr. Finn.

REASONS FOR GRANTING THE WRIT

The writ should issue because, by permitting the government agent to testify as to conversations he had with the informant, Tony Finn, regarding petitioner, conversations which although not related verbatim, were pregnant with highly prejudicial allegations of the absent informant, the trial court denied petitioner a fair trial and the Sixth Amendment right to confront the witnesses against him.

The writ should further issue because the prosecutor's summation, by repeatedly referring to the informant's absence as a witness, by inviting the jury to speculate as to what the witness would have testified to had he been alive, and by implying to the jury that the defense was purposely attempting to suppress evidence by the manner in which they posed their questions, deprived petitioner of a fair trial.

I.

As a preliminary matter it is not amiss to note that substantially all of the material evidence the government had originally hoped to introduce against petitioner was to have come from the lips of the informant Tony Finn. Thus, there can be no doubt that Mr. Finn's unavailability at the time of trial occasioned by his untimely death left an obvious and serious void in the evidence concerning petitioner, compelling the government to resort to the use of "secondary" evidence, that is, the agents' observations. Necessarily, then, whatever information did reach the jury of which Finn was the source, was certain to leave a substantial impression on the jury.

In an obvious attempt to fill the gaps in his case the prosecutor posed his questions to the government agent in a manner calculated to show the jury what claims and accusations were being made by the absent Tony Finn. The colloquy between the prosecutor and government agent Peterson is replete with improper questions eliciting prejudicial responses, as the following examples demonstrate:

> "Q. Will you describe that investigation to the jury, starting from the beginning? A. In early 1973, I developed an informant [Finn] for the purpose of initiating . . . narcotics cases against narcotic traffickers.
>
> * * *

> Q. Agent Peterson, [in] the middle of August, 1973 what, if anything else, did you do in connection with this case? A. [A]round August 20, I instructed Mr. Finn to purchase an eight kilogram of cocaine from an individual known at that time to me only as Philly.
>
> * * *
>
> Q. Did you give Mr. Finn any instructions at the time you searched his car? A. I provided Finn with $3,750 serialized official funds and instructed him to purchase one-eighth kilogram of cocaine from this individual known to me at this time as Philly.
>
> * * *
>
> Q. Agent Peterson, [in] October 1973, did you do anything else in connection with this case? A. I met with Mr. Finn just prior to . . . October 4, and instructed him to meet with Mr. Lubrano and agree to purchase a quarter kilogram of cocaine. I subsequently met with Mr. Finn and instructed him . . . on October 4, to meet with Mr. Lubrano and determine whether in fact Mr. Lubrano had a quarter kilo of cocaine for immediate sale.
>
> * * *

Q. Excuse me. Did Mr. Finn say anything to you when you met him at that prearranged location?

[Defense Counsel]: I have to object . . . .

The Court: Are you asking him to tell us what Finn said?

[Prosector]: No.

A. We had a conversation. As a result of this conversation, I gave Mr. Finn $6,400 and instructed him to purchase a quarter kilogram of cocaine from Mr. Lubrano."

In the Court of Appeals it was submitted that even in a case involving substantial competent evidence of a defendant's guilt, the prosecutor's technique described above and the resulting infusion of incompetent hearsay into the minds of the jurors would be troublesome to a reviewing court. But, where, as here, the evidence was totally circumstantial, the introduction of the incompetent hearsay took on very special importance. A reading of the record clearly shows that absent such legally impermissible information, petitioner should have, and would have been acquitted.

In its decision the Court of Appeals deemed the foregoing testimony "relevant to aid the jury in understanding the background events leading up to the crimes in question", (Slip Op. at 1366) (9a, 10a), citing *United States v. Ruggiero*, 472

F.2d 500 (2d Cir. 1973) and *United States v. Manfredonia*, 414 F.2d 760 (2d Cir. 1969). However, an in-depth analysis of those two cases will illustrate that, although the principle is sound, it may not be applied to the facts of this case.

In *Ruggiero* the defendant was charged with having falsely denied before a grand jury that he had had certain conversations with others regarding the possibility of bribing public officials. The bribery scheme involved numerous other individuals who had sought the defendant as a conduit for the money. During the trial these individuals testified as to certain conversations they had among themselves, and out of the defendant's presence, regarding the objectives of their plan. This testimony was challenged by the defendant as prejudicial hearsay but the court rejected the argument on the ground that it was "admissible as relevant proof of background operative facts." 472 F.2d at 607. In addition, the court found that "in view of the proof that [the individuals involved] were confederates or co-conspirators, testimony as to McCarthy's out-of-court utterances was admissible in the trial judge's discretion even though the indictment did not charge a conspiracy." 472 F.2d at 607.

It is obvious that without such background material the jury would have been unable to sift through the complex scheme to determine whether defendant's denials before the grand jury investigating the case were indeed perjurous. In short, absent such testimony, the jury would have been unable to determine the nature and extent of defendant's participation in the scheme. Note however, that the out-of-court declarations were harmless in themselves, as far as the defendant was concerned, and only when viewed in context of the entire series of events did they provide a setting for defendant's actions. Manifestly, even if they

had been offered for the truth of what was said, or if the jury took them as such, they could not have unduly prejudiced the jury.

In *Manfredonia*, defendant was also accused of perjury as a result of false testimony given at a previous trial where he had denied being in the business of accepting wagers. As part of the government's proof, a government agent who had posed as a "big time bettor" and an intermediary who had introduced the agent to defendant were permitted to testify about conversations they had had with each other out of defendant's presence regarding the introduction of the agent to defendant. The Court of Appeals rejected defendant's contention that the testimony was prejudicial hearsay, holding:

> ". . . [T]hese conversations were plainly relevant to show the events leading up to the introduction of [the agent] to Manfredonia. They were only offered for the purpose of showing that [the agent] and Manfredonia met and conversed and not for the truth of what they said to each other. Moreover, the trial court made this clear in its charge when it instructed the jury that such conversations might not be taken as evidence that Manfredonia was at any time engaged in bookmaking. Also, it should be noted that both [out of court declarants] testified in court and were available for cross-examination." 414 F.2d at 765.

Again, nothing in the out-of-court declarations was inherently prejudicial, and given the trial court's instructions it

can be safely assumed that whatever weight the jury placed on the substance of the conversations was minimal.

The same cannot be said for the hearsay declarations in this case. To begin with, the substance of agent Peterson's testimony was of a devastating nature and, with or without instructions, the jury could not logically have ignored it since it dealt with the ultimate issue before them, *i.e.*, whether petitioner sold drugs to Tony Finn. Thus, notwithstanding the government's assertion to the contrary, the out-of-court statements were offered for the truth of the matter asserted, that is, that Finn bought cocaine from petitioner because he was instructed to do so. What other logical inference could the jury draw from these statements, especially in light of the prosecutor's emphasis on them? (See, II, *infra*.)

Without the benefit of cross-examination of Finn, the jury could only conclude that, being a paid government informant, Finn followed his instructions. Clearly, petitioner's guilt was determined not on the basis of the surveillance team's observations, but on the one piece of evidence that directly linked him, at least in the jury's mind, with Tony Finn. Moreover, in the face of agent Peterson's previous testimony that he "developed an informant for the purpose of initiating narcotics cases against narcotic traffickers," his later statement that "as a result" of a conversation with Finn the latter was instructed to purchase narcotics from petitioner opened a pandora's box of speculations as to petitioner's status as a drug trafficker.

Although well disguised, the purpose of these out-of-court declarations was to implant in the mind of the jury the notion

that petitioner was a cocaine dealer from whom a substantial quantity was readily available. Indeed, the jury's verdict highlights this conclusion since by their acquittal on the sale count they discounted the observations of the surveilling agents, upon which that count was based, and instead convicted petitioner of some vague conspiracy on the assumption, impressed upon them by the hearsay testimony, that petitioner was a major narcotics trafficker.

We fail to perceive what other elucidating factor this testimony contained that would have aided the jury in understanding the background events. We also fail to see that the jury required such information to make a proper determination as to petitioner's guilt, since this case, unlike those cited by the Court of Appeals, was factually simple. In the final analysis, agent Peterson's hearsay utterances did not aid the jury in their inquiry, it answered the question for them.

Unlike both *Ruggiero* and *Manfredonia, supra,* the hearsay declarations in this case were not made by confederates or co-conspirators in furtherance of their crime *(cf. Ruggiero),* but rather by two government operatives, the most crucial of which was unavailable for cross-examination *(cf. Manfredonia).*

We believe the case at bar is more akin to *Favre v. Henderson,* 464 F.2d 359 (5th Cir. 1972) and respectfully urge this Court to apply the rationale therein to this case.

In that case defendant was charged with bank robbery. During the government's direct case the arresting officer was permitted to testify over objection that a confidential informant

had given him information that led to defendant's arrest. In holding the statement inadmissible hearsay, the court stated:

> "Whether offered by the prosecutor to establish identification, guilt or both, the testimony, when considered in light of its logical inferences, is hearsay. . . . Although the officer never testified to the exact statement made to him by the informant, the nature of the statements . . . was readily inferred. 464 F.2d at 362.

This is precisely what occurred here. Indeed, if the various factors considered by the *Favre* Court are applied, a similar disposition is compelled in this case.

First of all, Peterson's out-of-court statement clearly stated an expression about a past fact, *i.e.,* his instructions to Finn, based on their conversation, to purchase narcotics from petitioner, on which, as we have demonstrated, the jury had to have placed a great deal of emphasis. Secondly, there can be no doubt that had Finn been available to be cross-examined his unreliability would have been exposed. Given Finn's criminal background and agent Peterson's concession that he himself did not trust Finn, a host of motives to lie and falsely implicate petitioner might have been exposed. Third, as already noted, the hearsay evidence was crucial to the government's case and devastating to the defense. Fourth, as conceded by the government and acknowledged by the court below, the total evidence against petitioner was purely circumstantial, and although found to be sufficient, it was far from being overwhelming or even strong. In fact, without the hearsay

declarations, quite simply, the government had no case against petitioner. *Cf., Dutton v. Evans*, 400 U.S. 74, 91 S. Ct. 210.

In light of all these factors, we most respectfully suggest that the Court of Appeals erred in ruling the hearsay admissible. Even if limiting instructions had been requested and given, as the court suggested, it is not reasonable to assume that the jury would have refrained from relying on those statements as direct proof of petitioner's guilt.

In view of the foregoing, the conviction should be reversed and a new trial should be ordered.

II.

During the course of his summation the Assistant United States Attorney stated:

> "Any difficulty there is in this case results from the fact that, completely beyond anybody's control, the key person in the case, Tony Finn, is not here available to testify and tell you what happened.
>
> You noticed that during the trial the defense lawyers were very careful to ask each witness, 'of your own knowledge.' They didn't want you to hear what Tony Finn could have told you about what happened in these transactions" (T890-891).

Defense counsel presented a vigorous objection which was promptly overruled. The prosecutor continued:

> "But in general our case is based on what we considered at the time to be our secondary or back up source of proof.
>
> * * *
>
> Therefore, you have to bear with us to the extent that we can not tell you all the things that Tony Finn could tell you if he was here (T891).
>
> * * *
>
> Let me move on to the May 10 and 11 transaction. You remember that in-between this Vitale meets Finn up at the Lucky's Bar under the Whitestone Bridge, but unfortunately since we don't have Finn here to testify, we can't present to you what was said during that conversation up at Lucky's Bar. You have to use you [sic] common sense and see how that conversation fits into the proper relation of these drug deals that you have heard in evidence" (T901).

Although these comments were not presented as a separate issue on the direct appeal to the Court of Appeals, a full discussion thereof was submitted in the petition for rehearing. But, in any event, because they patently deprived petitioner of his constitutional right to a fair trial, this Court should reverse and order a new trial.

It is black letter law that in the prosecution of criminal cases the United States Attorney must always be cognizant of his responsibility to see that justice is done. To that extent, his zeal to win "his" case must be tempered by considerations of fair play and the rules of evidence which were designed for that purpose. At this point in our constitutional development there is no necessity to cite cases that delineate the boundaries of proper prosecutorial conduct. It is sufficient to note, as has been said, that "the exceedingly fine line which distinguishes permissible advocacy from improper excess is to be determined within the concrete terrain of specific cases." *United States v. White*, 486 F.2d 204 (2d Cir. 1973). We believe that in this case the prosecutor traversed that line and entered the realm of "improper excess."

To begin with, his allusion to some defense scheme to suppress evidence by prefacing their questions with "Of your own knowledge" was unfair because the prosecutor knew defense counsel's method was proper and totally within the rules of evidence. Indeed, the duty owed to his client dictated that the questions be posed in such manner. Yet, the prosecutor saw fit to convey to the jury the totally false impression that the defense had concocted some diabolical scheme to prevent them from hearing evidence that, in his opinion would conclusively show petitioner's guilt. In the face of the lengthy colloquy that was had with the court regarding the admissibility of the hearsay testimony, during which defense counsel put forth compelling evidentiary reasons for not allowing such testimony to be heard, the prosecutor's blatant suggestion to the jury that the defense had an improper motive was a conscious attempt to deceive and poison the jury's mind against the defendants and their counsel. See *DeChristoforo v. Donnelly*, 473 F.2d 1236 (1st Cir. 1973).

But the truly damaging aspect of the prosecutor's argument is the invitation it presented to the jury to speculate as to what Finn would have testified to had he been alive. This blatant attempt to tell the jury that evidence existed of which they did not have the benefit, but which showed petitioner's guilt, violates the most fundamental rule of fairness and is an intolerable abuse of the prosecutorial function. In effect, the jury was told that the death of Tony Finn was a great benefit to the defendant because as a result, and through the operation of technical legal rules, the truly damaging evidence could not be put before them.

> "A prosecutor may express his belief in the guilt of the accused if such belief is based solely on the evidence introduced and the jury is not led to believe that there is other evidence known to the prosecutor but not introduced, justifying that belief." *Henderson v. United States*, 218 F.2d 14, 19 (6th Cir. 1955).

Adding to the injury, the prosecutor then invited the jury to consider the existence of this other evidence and to use their "common sense" — a thinly-veiled suggestion to speculate — in placing it in context with the evidence that was introduced. Given the circumstantial nature of the case against petitioner, and given the prejudice already engendered by the admission of the hearsay testimony, the importance of which was emphasized by these comments, the prosecutor's summation was the ultimate blow that insured petitioner's conviction.

Petitioner asserts with implicit belief that these injudicious remarks by an able and experienced government attorney were

designed to overcome the obvious weakness of his case. They were made for the purpose, and had the effect, of getting before the jury for its consideration extrinsic evidentiary material tending to show petitioner's guilt of the offense charged. *Hall v. United States*, 419 F.2d 582 (5th Cir. 1969). As such, they constitute prejudicial and reversible error and this Court should rectify the grievous wrong by reversing the conviction and ordering a new trial.

CONCLUSION

For the above-stated reasons, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

s/ Howard J. Diller

DILLER, SCHMUKLER & ASNESS
Attorneys for Petitioner

APPENDIX A — JUDGMENT OF THE COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the thirtieth day of December one thousand nine hundred and seventy-five.

Present: HON. LEONARD P. MOORE

HON. WILLIAM H. MULLIGAN

HON. ELLSWORTH VAN GRAAFEILAND

Circuit Judges,

United States of America,

Plaintiff-Appellee

v.

Anthony Rizzo, Victor Vitale, Philip Lubrano,

Defendants

Appendix A — Judgment of the Court of Appeals

Philip Lubrano,

Defendant-Appellant.

75-1158

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed in accordance with the opinion of this court.

A. DANIEL FUSARO
Clerk

by Vincent A. Carlin
Chief Deputy Clerk

APPENDIX B — OPINION OF THE COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 254—September Term, 1975.

(Argued September 26, 1975 Decided December 30, 1975.)

Docket No. 75-1158

UNITED STATES OF AMERICA,

Appellee,

—against—

PHILIP LUBRANO,

Appellant.

Before:

MOORE, MULLIGAN and VAN GRAAFEILAND,

Circuit Judges.

Appeal from a judgment of conviction entered in the United States District Court for the Southern District of New York, Hon. Constance Baker Motley, *Judge,* after a jury had convicted appellant of conspiracy to distribute narcotics in violation of Title 21, United States Code, Section 846.

Affirmed.

LAWRENCE HOCHHEISER, Esq., Brooklyn, N.Y. (Hochheiser & Cohen, Brooklyn, N.Y., of counsel, Kenneth J. Aronson, Esq., on the brief), *for Appellant.*

JOHN TIMBERS, Esq., New York, N.Y. (Paul J. Curran, United States Attorney for the Southern District of New York, John D. Gordan, III, Assistant U.S. Attorney, of counsel), *for Appellee.*

MOORE, *Circuit Judge:*

The indictment charged in count one that Philip Lubrano ("Lubrano") and co-defendants Anthony Rizzo ("Rizzo") and Victor Vitale ("Vitale") conspired to distribute narcotics, in violation of 21 U.S.C. §846; count two charged that Vitale distributed 102 grams of cocaine on May 11, 1973; and count three charged that Lubrano distributed approximately 112.2 grams of cocaine on August 20, 1973, both in violation of 21 U.S.C. 841. The jury convicted Vitale of counts one and two, convicted Rizzo of count one, and convicted Lubrano of count one but acquitted him of count three. Appellant Lubrano was sentenced to five years imprisonment and three years special parole and was enlarged on bail pending this appeal.

Appellant asserts that evidentiary errors, improper communication with jurors during the trial, and insufficient evidence require reversal. In order to properly assess the

latter argument, we first review the evidence that was presented to the jury, viewing it as we must, in a light most favorable to the government. *United States* v. *McCarthy,* 473 F.2d 300, at 302 (2d Cir. 1972).

On May 1, 1973, Tony Finn ("Finn"), a government informant, talked with Rizzo and Vitale and later bought an ounce of cocaine from Vitale for $800, which amount law enforcement officers had previously given Finn. In the middle of May, Finn consummated another purchase from Vitale. During the negotiations Vitale told Finn that he would go "uptown" to obtain the narcotic, and in fact, Vitale drove north and entered Lubrano's store on East 56th Street. During Vitale's visit he briefly left the store several times to place calls from a phone in the nearby Gion Bar.

Against this background of initially limited interaction the principal evidence inculpating Lubrano stands in sharp relief. On August 20, 1973, after government agents gave Finn $3,750, he drove to and entered the Gion Bar where he spoke with Rizzo. Shortly afterward, Lubrano entered the bar and Rizzo introduced him to Finn. Minutes later Lubrano and Finn left the bar, walked around the corner to the Gaiety East Luncheonette and entered it together. Although there is no direct evidence of what happened once they were inside, when Finn left the luncheonette three to five minutes later, there was a bulge in the left front pocket of his clothing, and he later gave government agents a package containing 112.2 grams of cocaine.

Finally, on October 4, 1973, Lubrano entered an apartment building near his jewelry store and Finn followed shortly thereafter. Fifteen to twenty minutes later, Finn left the building and at a predetermined spot met with government agents who gave him $6,400 and told him to purchase a quarter kilogram of cocaine. Finn returned and re-entered the apartment building. His subsequent rendezvous with and search by government agents disclosed that after leaving the building he had the cocaine but no longer the money he had earlier received.

SUFFICIENCY OF EVIDENCE

Appellant, placing particular emphasis on *United States* v. *Vilhotti*, 452 F.2d 1186 (2d Cir. 1971); *cert. denied*, 406 U.S. 947, 92 S.Ct. 2051, 32 L.Ed. 2d 335 (1972); and *United States* v. *Cimino*, 321 F.2d 509 (2d Cir. 1963); *cert. denied*, 375 U.S. 974, 84 S.Ct. 491, 11 L.Ed. 2d 418 (1964), argues that the evidence is insufficient as a matter of law because, at best, it proves only that he was associated with the co-conspirators or merely present at the scene of their crimes.

Finn, the key participant, was no longer living at the time of the trial and therefore, most of the evidence adduced against Lubrano was circumstantial. However, after reviewing the facts and permissible inferences therefrom, we conclude that the evidence was sufficient for a jury to find appellant guilty beyond a reasonable doubt. The events of any particular day in isolation from all the rest may be inconclusive, but taken together, the jury could properly

have found that Rizzo led Finn to Vitale, who supplied him with cocaine, that Vitale obtained the cocaine from Lubrano, and that Lubrano dealt directly with Finn on August 20th and October 4th.

We have examined the cases cited by appellant which discuss the sufficiency of evidence, but although we do not disagree with those decisions or their rationale, they are of little assistance. In *Vilhotti* the government argued that two defendants' mere presence in a garage containing stolen goods was sufficient to sustain their convictions of receiving and possessing stolen goods, and the court reversed. In the instant case, the jury could have found that appellant was not merely present, but was an active participant. Considering the events of August 20th and October 4th as a whole, the jury properly could have concluded beyond a reasonable doubt that Lubrano twice sold Finn cocaine.

Appellant also relies on *Cimino* for the proposition that a mere meeting is not evidence of a conspiracy where no witness overheard the defendants' conversations or saw anything pass from one to the other. *Cimino's* affirmance was predicated on the additional evidence of an admission by one of the defendants. But although no one saw or heard what was said or done by Lubrano or Finn inside the luncheonette and apartment building, there was evidence that cocaine had passed "from one to the other". When Finn left the luncheonette his left pocket was bulging, and there is no evidence that he placed anything in that pocket before reaching the predetermined rendezvous point where

a search by government agents yielded cocaine. The same is true of the October 4th apartment building transaction. These facts in the context of the additional circumstantial proof render any innocent explanation fanciful. Even if an innocent explanation of Lubrano's actions was plausible, we note in passing the settled law in this circuit that, to be sufficient as a matter of law, circumstantial evidence need not exclude all possible inferences but those of guilt. *United States* v. *Woodner*, 317 F.2d 649, 651 (2d Cir.), *cert. denied*, 375 U.S. 903, 84 S.Ct. 192, 11 L.Ed. 2d 144 (1963). Questions of sufficiency of the evidence are often *sui generis*. The appropriate determination varies with the particular facts *sub judice*. In this case those facts were sufficient as a matter of law for the jury to convict appellant of conspiracy to distribute narcotics.[1]

EVIDENTIARY RULINGS

Appellant also asserts as error several evidentiary rulings concerning the testimony of Government Agent Peterson, who supervised and directed Finn's activities. First, appellant argues that the reception of Peterson's

1 Appellant also suggests that his acquittal of the substantive count precludes reliance upon facts relevant to that count in evaluating the sufficiency of the evidence as to the conspiracy count. This argument has been raised repeatedly and consistently rejected. *See, e.g., United States* v. *Zane*, 495 F.2d 683 (2d Cir.), *cert. denied*, 419 U.S. 895, 95 S.Ct. 174, 43 L.Ed. 2d 775 (1974), and cases cited therein at 690. The rule of law articulated in *Zane* preserves the integrity of the jury by closing the door on interminable speculation about the jury's motive for any given verdict.

testimony which contained his instructions[2] to Finn was improper. These instructions frequently linked appellant with Finn's activities, and for this reason appellant asserts they were prejudicial. We disagree. The instructions by the principal, Peterson, to his agent, Finn, immediately preceding Finn's meeting with Lubrano and the other defendants were relevant to aid the jury in understanding

2 Peterson gave these instructions to Finn while Finn was being searched and given money with which to purchase narcotics. An excerpt of the testimony follows:

"Q. Agent Peterson, [in] the middle of August, 1973, what if anything else did you do in connection with this case?

A. I believe it was around August 20th I instructed Mr. Finn to purchase an eighth kilogram of cocaine from an individual known at that time to me only as Philly." (Tr. 260)

• • •

"A. Myself and Agent Smith met with Mr. Finn, where we searched him, fitted him with the electronic transmitting device, searched his vehicle—" (Tr. 260)

• • •

"Q. Did you give Mr. Finn any instructions at the time you searched his car?"

• • •

"A. I provided Finn with $3,750 serialized official funds and instructed him to purchase one-eighth kilogram of cocaine from this individual known to me at this time as Philly." (Tr. 264-65)

• • •

"Q. Agent Peterson, directing your attention to October, 1973, did you do anything else in connection with this case?"

• • •

"A. I met with Mr. Finn just prior to I believe October 4 and instructed him to meet with Mr. Lubrano and agree to purchase a quarter kilogram of cocaine. I subsequently met with Mr. Finn and instructed him to on October 4th, to meet with Mr. Lubrano and determine whether in fact Mr. Lubrano had a quarter kilo of cocaine for immediately [sic] sale." (Tr. 272-73).

the background events leading up to the crimes in question. *United States* v. *Ruggiero*, 472 F.2d 599, 607 (2d Cir.), *cert. denied*, 412 U.S. 939, 93 S.Ct. 2772, 37 L.Ed. 2d 398 (1973); *United States* v. *Manfredonia*, 414 F.2d 760, 765 (2d Cir. 1969). Although they were inadmissible as proof of the matters asserted, if a limiting instruction had been requested, it might well have been given. *Manfredonia, id.*

Appellant also contends that portions of Peterson's testimony should have been stricken on the grounds that Peterson lacked personal knowledge of the events in question and was acting as a conduit for inadmissible hearsay which he couched in narrative terms. In particular, appellant asserts that the reception of the following question and answer on re-direct was reversible error:

> "Q. Agent Peterson, what cocaine that has been introduced into evidence during this trial do you attribute to the defendant Lubrano?
>
> • • •
>
> "A. The May 10th and 11th transaction; the August 20th transaction, and the October 4th transaction." (Tr. 466).

Appellant's previous cross-examination of Peterson demonstrated that Peterson's "attribution" testimony was not based on first hand observation of any sort. *See, e.g.*, Tr. 279-280. Peterson's testimony resulted from hearsay of Finn, and as such it would have been inadmissible absent other factors. *United States* v. *Borelli*, 336 F.2d 376, 392 (2d Cir. 1964); *cert. denied sub nom, Cinquegrano* v.

United States, 379 U.S. 960, 85 S.Ct. 647, 13 L.Ed. 2d 555 (1965); 2 Wigmore, Evidence, §657(a) (1940 ed.). However, appellant opened the door to the reception of Peterson's re-direct testimony by posing a question on cross-examination which was virtually identical to the contested question posed on re-direct:

> "Q. And the only cocaine that you can attribute to Mr. Lubrano in this courtroom is cocaine that Mr. Finn gave you?
>
> A. That's correct." (Tr. 386)

In posing this question, appellant's objective may have been to further expose Peterson's lack of first-hand knowledge or observation, but attribution was injected into the case at this point, and the trial judge did not abuse her discretion in permitting a follow-up question on re-direct.

Appellant next contends reversible error was committed when the court admitted evidence that informant Finn had been "wired" prior to meeting Lubrano on August 20th and October 4th. He denies that the error was harmless, arguing that on the basis of such testimony the jury may have inferred that government agents received transmissions corroborating the prosecution's theory of the case when in fact the Judge had already ruled such transmissions to be inaudible and, therefore, inadmissible. We disagree with appellant's contention.

The information that recording and transmitting devices had been placed on Finn on August 20, was volunteered in response to questions that did not directly touch upon the

excluded recordings, and the government immediately dropped the matter following a brief side-bar. (Tr. 260-265). The testimony did not disclose that tape recordings had been made or what were the purported contents of the tapes. The testimony that recording and transmitting devices had been placed on Finn on October 4th was initially volunteered by Agent Sennett. (Tr. 570). On re-cross, it was explored further by other defense counsel. Once again, no disclosure of the tape contents resulted. In light of these facts, we do not believe that this testimony prejudiced appellant or deprived him of a fair trial.

INTERFERENCE WITH JURY

During a trial recess, the Deputy Marshal undertook to obtain coffee for two jurors. Since he was already guarding a prisoner, he asked Agent Fernandez to fetch it for him. Agent Fernandez, although he did not testify, was present throughout the trial and sat at the prosecution's counsel table. He took two jurors' orders and money, obtained the coffee, and then distributed it to the jurors, explaining which cups contained cream and which were black. Upon discovery of this incident, appellant moved for a mistrial and now argues on appeal that his conviction must be reversed. We do not concur.

This incident was improper and unfortunate. It should not have occurred. *Cf. Remmer* v. *United States,* 347 U.S. 227, 74 S.Ct. 450, 98 L.Ed. 2d 654 (1954). However, when an unauthorized private communication or contact with a juror during a trial does not relate to a matter pending

before a jury, a trial judge's denial of a mistrial motion is not an abuse of discretion absent a showing of prejudice by the defendant. *United States* v. *Brasco,* 516 F.2d 816 (2d Cir. 1975). On these facts we cannot discern any prejudice suffered by appellant. Nor has appellant suggested unexplored avenues that might prove the contrary. Indeed, after Judge Motley heard two slightly varying descriptions of the same incident, counsel did not request an evidentiary hearing.

Appellant has moved for an evidentiary hearing on this appeal. However, the communications with the jurors were totally unrelated to the matters pending at trial, and in the absence of some showing of prima facie prejudice, we decline to grant counsel's motion at this late date. *United States* v. *Gersh,* 328 F.2d 460, 464 (2d Cir.), *cert. denied,* 377 U.S. 992, 84 S.Ct. 1919, 12 L.Ed. 2d 1045 (1964).

The judgment of conviction is affirmed.

Supreme Court, U. S.
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No. 75-1484

In the Supreme Court of the United States

OCTOBER TERM, 1976

PHILIP LUBRANO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 3a-13a) is reported at 529 F. 2d 633.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1a-2a) was entered on December 30, 1975. The petition for a writ of certiorari was filed on April 14, 1976, and is therefore substantially out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether testimony by a government agent as to instructions he gave to an informant, who had died prior to trial, was properly admitted into evidence.

2. Whether the government's summation was improper.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioner and two co-defendants were convicted of conspiracy to distribute cocaine, in violation of 21 U.S.C. 841(a)(1).[1] Petitioner was sentenced to five years' imprisonment followed by a special parole term of three years. The court of appeals affirmed (Pet. App. 3a-4a).

The evidence at trial showed that on May 1, 1973, government informant Finn talked with defendants Rizzo and Vitale and later bought an ounce of cocaine from Vitale, using government funds. About the middle of May, Finn made another purchase of cocaine from Vitale. During the negotiations, Vitale told Finn he would go "uptown" to get the cocaine, after which he went to petitioner's jewelry store on 56th Street in New York City. Several times during Vitale's visit he left the store and went to the nearby Gion Bar to make phone calls (Pet. App. 5a).

On August 20, 1973, Finn, who had been given $3,750 in government funds, spoke with Rizzo at the Gion Bar and was introduced to petitioner. Petitioner and Finn then walked to the Gaiety East Luncheonette. About five minutes later, Finn left the luncheonette, a bulge showing in his left front pocket. He thereafter gave government agents 112.2 grams of cocaine (Pet. App. 5a).

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[1]The indictment charged conspiracy to distribute cocaine (Count 1), distribution of 102 grams of cocaine by co-defendant Vitale on May 11, 1973 (Count 2), and distribution of 112.2 grams of cocaine by petitioner on August 20, 1973 (Count 3). The defendants were convicted as charged, except that petitioner was acquitted on Count 3 (Pet. App. 4a).

On October 4, 1973, petitioner entered an apartment building near his jewelry store, followed shortly thereafter by Finn. About twenty minutes later, Finn left the building and met government agents at a predetermined spot. The agents gave him $6,400 in government funds and instructed him to buy a quarter kilo of cocaine. Finn reentered the apartment building and thereafter returned to the government agents with the cocaine (Pet. App. 6a).

ARGUMENT

1. Petitioner contends (Pet. 8) that the prosecutor improperly asked a number of questions of narcotics agent Peterson in "an obvious attempt to fill the gaps in his case" caused by the untimely death of informant Finn. The questions concerned Peterson's recruitment of Finn as an informant, Peterson's instructions to Finn in August 1973 to purchase a quantity of cocaine from an individual known to Peterson only as "Philly", the provision of $3,750 in government funds to Finn, and a meeting with Finn in October 1973, when Finn was instructed to buy a quarter kilo of cocaine from petitioner, for which he was given $6,400 (Pet. 8-10). We rely primarily on the answer to petitioner's contention given by the court below (Pet. App. 9a-10a):

> The instructions by the principal, Peterson, to his agent, Finn, immediately preceding Finn's meeting with Lubrano and the other defendants were relevant to aid the jury in understanding the background events leading up to the crimes in question. *United States* v. *Ruggiero*, 472 F. 2d 599, 607 (2d Cir.), *cert. denied*, 412 U.S. 939, 93 S. Ct. 2772, 37 L. Ed. 2d 398 (1973); *United States* v. *Manfredonia*, 414 F. 2d 760, 765 (2d Cir. 1969). Although they were inadmissible as proof of the matters asserted, if a limiting instruction had been requested, it might well have been given. *Manfredonia, id.*

We point out additionally that Peterson testified only to what he himself said, not what the informant said, and Peterson was fully available for cross-examination. His testimony was thus not hearsay (see Rule 801(c), Fed. R. Evid.), petitioner was not deprived of his right of confrontation and, as the court of appeals noted, the evidence was relevant to an understanding of other testimony as to petitioner's action.[2]

2. Petitioner also seeks the Court's consideration of a contention, urged below only on motion for rehearing (Pet. 17), that the prosecutor's summation deprived him of a fair trial. In summation, petitioner's counsel argued (Tr. 880):

> And that's why in a lot of cultures from thousands of years ago it has been written that no man should be convicted on the testimony of an individual like Finn, and he's not even here with his testimony. No man should be convicted on Finn's actions, Finn's information and Finn's testimony, no one. But he's getting paid more for this than for his trouble to come to court even if he were to come to court. He's interested in the outcome of the case, he's a scoundrel and a rogue. And he's not despite Mr. Timbers and these agents efforts, and I will show you that's plastic, he's not corroborated by even one other witness, and I am going to show you that concerning Lubrano. So you not only are asked to convict Lubrano on the testimony of one witness, but one witness who is absent, and one witness who is not corroborated.

[2]Petitioner's reliance (Pet. 14) on *Favre* v. *Henderson*, 464 F. 2d 359 (C.A. 5), is misplaced. In *Favre* the prosecutor elicited answers from a police officer as to information he had received from an anonymous source, information which indicated the guilt of the accused.

Defense counsel on several occasions told the jury, "Finn isn't here to testify" (Tr. 882, 885). Government counsel made the following reply, and this is the only place where a defense objection was made (Tr. 890-891):

> Any difficulty that there is in this case results from the fact that, completely beyond anybody's control, the key person in the case, Tony Finn, is not here available to testify and to tell you what happened.
>
> You noticed that during the trial the defense lawyers were very careful to ask each witness, "of your own knowledge." They didn't want you to hear what Tony Finn could have told you about what happened in these transactions.
>
> MR. HOCHHEISER: I must object to that, your Honor. I must object to preserve the record. The Court of Appeals says so. I must object to that comment.
>
> THE COURT: Your objection is registered.
>
> MR. HOCHHEISER: Is it overruled, your Honor?
>
> THE COURT: Overruled.

The clear implication of defense counsel's remarks was that petitioner had been disadvantaged by Finn's absence from the trial. The prosecutor was justified in answering this by calling the jury's attention to the fact that Finn's absence was not caused by the prosecution and was not necessarily to the prosecution's advantage. The district court did not abuse its discretion in overruling petitioner's objection.

Petitioner's further objection, not raised at trial, that it was improper for the prosecutor to tell the jurors to use their "common sense" as to what was said at one of the

meetings of the conspirators (Pet. 17) lacks substance and clearly does not rise to the level of plain error. Lawyers for both sides in a criminal trial commonly and quite properly exhort the jurors to use their common sense in evaluating the evidence and drawing inferences therefrom.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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